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Committee Secretary
Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum
PO Box 6201
Canberra ACT 2600

Dear Secretary

RE: INQUIRY INTO THE ABORIGINAL AND TORRES STRAIT ISLANDER VOICE REFERENDUM - CONSTITUTION ALTERATION (ABORIGINAL AND TORRES STRAIT ISLANDER VOICE) 2023

Thank you for the opportunity to provide this submission. We are Associate Professors at the University of Sydney Law School. Associate Professor Arcioni's research relates to Australian constitutional law focusing on constitutional identity; 'the people' in the Australian Constitution. Associate Professor Edgar's research relates to administrative law and focuses on regulation-making. He is the Legal Advisor for the Senate Standing Committee for the Scrutiny of Delegated Legislation. His contribution to this submission is made as an administrative law researcher rather than as Legal Advisor to the Senate Committee.

This submission is brief and we can supplement with detail in a later submission and at a public hearing if requested by the Committee. We are available to appear on Friday 14 April.

Section 129 – the necessity of enshrinement of the Voice

Enshrinement of the Voice in the Constitution is necessary for several reasons.

First, to guarantee the existence of the institution of the Voice. A legislated Voice would – through the operation of the sovereignty of Parliament – be amenable to repeal by legislation. That is, what Parliament can make, Parliament can un-make. In order to ensure a guaranteed and durable institution, the Voice must be enshrined in the Constitution.

Second, enshrinement confers legitimacy on the Voice. 'The people' in the Constitution exercise their sovereignty through involvement in elections and in constitutional referenda. The highest form of legitimacy comes from the representative Parliament

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proposing a change to the Constitution and 'the people' – through the electors – voting to adopt that change.

Third, enshrinement is the form of recognition sought by First Nations peoples through the consensus position outlined in the Uluru Statement from the Heart. Constitutional recognition – in order to be genuine and effective – must align with the form of recognition sought by those who are to be recognised.

Preambular statement – rectifying a silence, the identity of 'the people'

The proposed preambular statement to s 129 would rectify a constitutional silence. Since the 1967 referendum, there has been no reference to Aboriginal and Torres Strait Islander people in the Constitution. Reference to them, as the First peoples of Australia, would better align the Constitution with social and legal developments that have occurred since federation.

The recognition of Aboriginal and Torres Strait Islander peoples continues the trajectory of the development of the constitutional identity of 'the people' in the Constitution. The constitutional identity of 'the people' has developed since federation – from an expectation of a White Australia to an understanding of a diverse and plural people. We have seen a change in who constitutes 'the people' over time – from a colonial era where women were excluded in a majority of colonies from voting to adopt the Constitution Bill, to the modern era where the High Court has assumed that all adult citizens should have the right to vote. To enshrine a Voice is not to import an illegitimate racial element into the Constitution. It is simply to recognise the distinct place of First Nations peoples in the Australian polity, consistent with the ongoing development of the constitutional identity of 'the people'.

Consistency with constitutional design: sub-sections (i), (ii) and (iii)

The structure of the Voice proposal is consistent with Australian constitutional design. Constitutions in general – and the Australian Constitution in particular – establish the core elements of institutions in the constitutional text and defer details to legislation.

The Voice is to be established under sub-s (i), its core function in sub-s (ii) and then details left for determination by the Parliament in sub-s (iii). This constitutional design is not only orthodox but particularly appropriate for representative institutions such as the Voice. Representation requires careful attention to the detail and structure of the form of representation of the relevant groups and must be amenable to change over time. The only way for this to occur in relation to the Voice is for such detail to be left to the Parliament to place in legislation. Those details will then be dependent on the political

will of the Parliament from time to time, to negotiate in concert with Aboriginal and Torres Strait Islander peoples to ensure their effective representation.

The Voice and the Executive: sub-sections (ii) and (iii)

The ability of the Voice to make representations to the Executive is consistent with existing institutional relationships and the legal effect of such representations can be determined by the Parliament. The power in s 129(iii) to make laws for "procedures" relating to the Voice will enable Parliament to control the manner in which the consultation between the Voice and the Executive Government occurs and also limit the risk of the consultation, or lack of consultation, being challenged in the courts.

Concerns were raised prior to the Referendum Bill being introduced that the inclusion of the Voice in the Constitution would prompt much administrative law litigation regarding the consultation process. We do not believe this to be the case.

Consultation sections of Acts providing for simple legal obligations to consult the public generally or a particular organisation have been enforced by the courts. There are not many of these cases but there are some important examples (see, Tickner v Chapman (1995) 57 FCR 451; [1995] FCA 1726; Kutlu v Director of Professional Services Review (2011) 197 FCR 177, [2011] FCAFC 94).

However, the consultation sections of other Acts make clear that the consultation obligation is not enforceable by courts. The consultation provisions in the Legislation Act 2003 that apply to Commonwealth regulations (ss 17, 19) are designed to prevent litigation. They provide that the form of consultation is a matter for the discretion of executive government officials and that the failure to consult does not affect the validity or enforceability of a regulation.

While the Legislation Act prevents the risk of litigation regarding its consultation provisions, there are additional transparency and accountability requirements for consultation for Commonwealth regulations. Section 15J(2) of the Legislation Act requires explanatory statements for regulations to include a description of the regulation-maker's consultation and if they do not conduct a consultation process to explain why not.

In addition, the Senate Scrutiny of Delegated Legislation Committee is required to scrutinise regulations for whether "those likely to be affected by the instrument were adequately consulted in relation to it" (Senate Standing Order 23(3)(d)). This standing order authorises the Senate Committee to raise questions with regulation-makers if there is a failure to consult or if the consultation is apparently inadequate. The Committee can also draw particular matters to the attention of the Senate on the grounds that they raise

significant issues or are likely to be of interest to the Senate (Senate Standing Order 23(4)).

The Parliament will be able to evaluate the different forms of provision for consultation in Commonwealth Acts and parliamentary rules in deciding how to regulate consultation processes between Executive Government and the Voice. There are advantages and disadvantages in the different checks on administration of consultation processes. Consultation provisions come in different forms, including forms that make them not judicially enforceable and are scrutinised by Parliament. Parliament will be able to determine whether the consultation with the Voice will be reviewable exclusively by Parliament, or exclusively by the Courts, or maybe even by both Parliaments and potentially the Courts.

Therefore, there is no reason to think that the inclusion of the Voice into the Constitution will necessarily prompt large amounts of litigation. The concerns about risks of litigation are premature. The appropriate time for considering whether, and if so how, Voice representations to the Executive may have legal implications is if the referendum succeeds. At that time, the Parliament will determine the content of its legislation regarding the functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice and in doing so will have a range of options available to it regarding the legal impact, if any, of the representations of the Voice.

Yours sincerely,

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